Sim Tze Chui v Peter Steven Kestel & Ors

HIGH COURT (KUALA LUMPUR) — PETITION NO D8–26–48 OF 2000
ABDUL WAHAB AHMAD J
22 MAY 2006

Civil Procedure — Contempt of court — Breach of consent order and undertaking — Whether the handing over of the sub lease an act of transfer and/or encumberance — Whether petitioner affected by the surrender of the sub lease

The petitioner claimed that the petitioner's rights as a majority shareholder had been oppressed by the actions of the first, second, third and fourth respondents. The fourth respondent was the holding company of the fifth respondent. The first and third respondents were directors in the fourth respondent. The second respondent was appointed by the third respondent as an additional director. There were certain oppressive acts alleged by the petitioner. The petitioner filed an application in encl 7 for an interim injunction. This was to restrain the respondents from inter alia disposing off, transferring and charging the company assets. Before encl 7 was heard, the parties recorded a consent judgment on 9 November 2000 to maintain the status quo of the parties. The petitioner filed an application to commit the respondents for contempt of court in encl 90 for failure to comply with the consent order dated 9 November 2000. The court had given leave to make the application on 23 October 2001. The committal application referred particularly to paragraph four of the said consent order where the respondents had given an undertaking that they would not transfer or encumber in any way the fourth and fifth respondents' assets. The asset in question was a sub lease with all the rights under it held and registered in the fourth defendant's name on the land held under Mining Certificate Title 1/113 in the District of Lipis, Mukim of Ulu Jelai, Tempat Sungai Kermoi, Pahang. By a letter dated 14 February 2001, during pendency of the consent order, the respondents had written to the Pentadbir Tanah, Lipis Land Office for the surrender of sub lease MC 1/113. The issue for the court to determine was (1) whether the handing over of the sub lease for MC 1/113 from the fourth respondent to the fifth respondent was an act of transfer and/or encumberance whereby the first, second and third respondents had breached their undertaking in the consent order dated 9 November 2000, extended by the consent order dated 5 December 2000. The respondents argued that the sub lease for MC 1/113 from the fourth to the fifth respondent do not constitute contempt of court. However, the petitioner's counsel argued that the order 'not to transfer or encumber in anyway whatsoever' was wide to cover the surrender of the sub lease'.

Held, application for an order of committal refused with no order as to costs:

(1) The words of the said order must be read to facilitate maintaining the status

quo pending hearing of the petition where the respondent shall not transfer or encumber the assets of the fourth and fifth respondent. There was clearly no transfer of the asset out of the fourth defendant to the fifth respondent. The act of surrendering the sub lease back to the fifth respondent. The consent order was to prevent the assets of the fourth and fifth respondent be transferred or encumbered to any other entity. The act of surrendering the sub lease does not amount to 'transfer or encumberance' of the assests (see para 16).

(2) The ultimate question for the court in this contempt proceeding was whether the acts of the respondent had caused the assets to be dissipated to any other third party to defeat or impede any order the petitioner may obtain in respect of those assets in this petition. The petitioner would not be affected by the surrendering of the sub lease and was not prejudiced in any way as averred in the petition that the petitioner was the ultimate shareholder of the fifth respondent. The act of surrender to the fifth respondent does not divest the asset to frustrate the underlying purpose of the undertaking (see para 18).

[Bahasa Malaysia summary

Pempetisyen mendakwa bahawa haknya sebagai pemegang saham majoriti telah ditindas melalui tindakan-tindakan responden pertama, kedua, ketiga dan keempat. Responden keempat adalah syarikat induk kepada responden kelima. Responden pertama dan ketiga adalah pengarah-pengarah di dalam responden keempat. Responden kedua dilantik oleh responden ketiga sebagai pengarah tambahan. Pempetisyen mendakwa terdapat perbuatan-perbuatan menindas. Pempetisyen memfailkan satu permohonan dalam lampiran 7 untuk injunksi interim. Ianya untuk menghalang responden-responden, antara lainnya, dari menjual, memindahmilik dan menggadai aset-aset syarikat. Sebelum lamp 7 dibicarakan, pihak-pihak telah merekodkan satu penghakiman persetujuan pada 9 November 2000 untuk mengekalkan status quo pihak-pihak. Pempetisyen memfailkan satu permohonan mendakwa responden-responden menghina mahkamah melalui lamp 90 kerana gagal untuk mematuhi perintah persetujuan yang bertarikh 9 November 2000. Mahkamah telah pada 23 Oktober 2001 memberi izin untuk membuat permohonan tersebut. Permohonan komital itu merujuk terutamanya kepada perenggan 4 perintah persetujuan tersebut dimana responden-responden telah memberi akujanji bahawa mereka tidak akan memindah milik atau memasukkan bebanan dalam apa cara sekalipun ke atas aset-aset responden keempat dan kelima. Aset tersebut merupakan satu sub-pajakan yang kesemua hak-haknya yang dipegang dan didaftarkan di bawah nama defendan keempat ke atas tanah yang dipegang dibawah Hakmilik Sijil Perlombongane 1/113 dalam Daerah Lipis, Mukim Ulu Jelai, Tempat Sungai Kermoi, Pahang. Melalui surat bertarikh 14 Februari 2001, sementara menunggu perintah persetujuan, responden-responden telah menulis kepada Pentadbir Tanah, Pejabat Tanah Lipis untuk menyerahhakkan sub pajakan MC 1/113. Isu yang perlu diputuskan oleh mahkamah ialah (1) samada penyerahan sub pajakan MC 1/113 dari responden keempat kepada responden kelima adalah satu perbuatan pindahmilik dan/atau bebanan dimana responden pertama, kedua dan ketiga telah meningkari akujanji mereka dalam perintah persetujuan bertarikh 9 November 2000, yang diberi oleh perintah persetujuan bertarikh 5 Disember 2000. Responden-responden menghujjahkan yang sub pajakan MC 1/113 dari responden keempat kepada

responden kelima bukanlah satu penghinaan mahkamah. Namun begitu, peguamcara pempetisyen menghujahkan bahawa perintah 'tidak memindah milik atau meletakkan bebanan dalam apa cara sekalipun' adalah cukup luas untuk merangkumi penyerahan sub pajakan itu'.

Diputuskanpermohonan untuk komital ditolak tanpa perintah untuk kos:

(1) Perkataan-perkataan di dalam perintah tersebut hendaklah ditafsirkan bagi memudahkan pengekalan status quo sementara menunggu petisyen dimana responden tidak akan memindah milik atau meletakkan bebanan pada aset-aset responden keempat dan kelima. Ianya jelas tiada pindahmilik aset dari defendan keempat kepada responden kelima. Perbuatan menyerahkan sub pajakan itu meletakhakkan semula pajakan tersebut kepada responden kelima. Perintah persetujuan yang menghalang aset-aset responden keempat dan kelima dipindah milik atau dibebankan kepada sebarang entiti. Perbuatan menyerahkan sub pajakan bukanlah satu 'pindahmilik atau letakan bebanan' aset-aset tersebut (lihat perenggan 16).

(2) Soalan utama bagi mahkamah dalam prosiding penghinaan ini adalah samada perbuatan-perbuatan responden telah menjadikan aset tersebut dilesapkan kepada pihak ketiga bagi menggagalkan atau menyukarkan sebarang perintah yang mungkin diperolehi pempetisyen terhadap aset-aset tersebut dalam petisyen ini. Pempetisyen tidak terjejas atau diprejudiskan dengan penyerahan sub pajakan tersebut dalam apa cara sekalipun sebagaimana yang dikatakan didalam petisyen tersebut kerana pempetisyen pada akhirnya adalah pemegang saham responden kelima. Perbuatan penyerahan kepada responden kelima tidak melucutkan aset tersebut bagi menggagalkan dasar tujuan akujanji tersebut (lihat perenggan 18).]

Notes

For cases breach of consent order and undertaking, see 2 *Mallal's Digest* (4th Ed,) Consolidated Subject Index para 1542.

Legislation referred to

Mining Enactment ss 3(1), (3), 38

Viknesh Kumar (Balraj with him) (Balendran Chong & Bodi) for the petitioner.
Mohd Zawahir (Zainal Ithnin & Partners) for the respondents.

Abdul Wahab Ahmad J:

[1] The petitioner holds 99.9% shares in the fourth respondent which is the holding company of the fifth respondent. She is the ultimate shareholder in the fifth respondent. She claimed that her rights as a majority shareholder had been oppressed by the actions of the first, second and third respondents.

[2] The first respondent is an Australian. He represented himself as a person with ten years of experience in the gold mining industry. Based on this representation,

A the petitioner agreed that the first respondent manage her gold mining business in Kuala Lipis, Pahang. It had been the petitioner's ambition to have a business in gold mining. The first respondent then brought in one Zaidi bin Harun, the second respondent, as a director.

B **[3]** The petitioner bought a RM2/- company, the fourth respondent. She directed that a share at RM1/- be transferred to the first respondent whilst the petitioner held the remaining one share. The petitioner then subscribed 998 ordinary shares at RM1 each, making the petitioner the majority shareholder, with 999 shares out of 1,000 shares issued in the fourth respondent.

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[4] The fifth respondent is the registered sub-lessees of Mining Certificates MC 1/70 and MC 1/113. The fifth respondent became a wholly owned subsidiary of the fourth respondent.

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[5] The petitioner, first and third respondents are also directors in the fourth respondent. The petitioner's profession as Advocate and Solicitor did not leave her much time for the gold mining industry. The petitioner had therefore appointed the third respondent as additional director and she herself resigned as director of the fourth respondent. The first and second respondents appointed the third respondent,
E Abas bin Johar, as additional director and the petitioner in turn appointed Mr Murray and Mr Choong as additional director.

[6] The petitioner filed an application in encl 7 for an interim injunction to restrain the respondents from inter alia, disposing off, transferring and charging the
F company assets, dismissing the petitioner and one Kenneth Baker as directors, increasing share capital and holding any meetings without giving notice to the petitioner or her representative.

[7] Before encl 7 was heard, the parties recorded a consent judgment on
G 9 November 2000 to maintain the status quo of the parties. The petitioner subsequently filed an application to commit the respondents for contempt of court in encl 90 for not complying with the consent order dated 9 November 2000. The court had given leave to make the application on 23 October 2001.

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[8] The committal application refers particularly to paragraph 4 of the said consent order where the respondents had given an undertaking that they will not transfer or encumber in any way the fourth and fifth respondents' assets. The asset in question is a sub-lease with all the rights under it held and registered in the fourth defendant's name on the land held under Mining Certificate Title 1/113 in the District of Lipis,
I Mukim of Ulu Jelai, Tempat Sungai Kermoi, Pahang.

[9] By a letter dated 14 February 2001, during the pendency of the consent order, the respondents had written to the Pentadbir Tanah, Lipis Land Office for the surrender of sub lease MC 1/113.

[10] In his affidavit dated 9 December 2002, the first respondent answered that the respondents had succeeded in constructing a mining plant and the site had been inspected by officers from the Land and Minerals Office and they are awaiting the issuance of a mining permit. The first defendant also averred that he believed that the State Government would not extend the duration of the sub lease if steps to proceed with the mining operations are not taken. This is in view of the fact that there are conditions in the sub lease that will expire in July 2001.

[11] The issue for determination of this court is:

Whether the handing over of the sub lease for MC 1/113 from the fourth respondent to the fifth respondent is an act of transferring and/or encumbering; whereby the first, second and third respondents had breached their undertaking in the consent order dated 9 November 2000 that was extended by the consent order of 5 December 2000.

[12] The respondents said that the surrender of the sub sublease for MC 1/113 from the fourth respondent to the fifth respondent does not constitute contempt of court. The act does not connote that the sub lease was transferred to another entity. 'Transfer' and 'surrender' carry two different meanings. The 'surrender' was made based on a genuine belief of the existence of a certain fact.

[13] No transfer is permitted under s 38 of the Mining Enactment. Sections 3(1) and 38(2) provide that a sub lease may be leased to become a sub sublease. However, s 38(3) prohibits a sub sublease from further being sub leased into a sub sub sublease. The Land office would never register it.

[14] From the legal point of view, transfer or conveyance and surrender carry different meanings. LB Curzon's Dictionary of Law says that the word 'transfer' means the conveyance of title or other interest in property through sale and purchase or gift. Conveyance had been defined as transfer of ownership of property by an instrument effecting the transfer as prescribed by law. Surrendering in law would mean surrender and determined as in determination of tenancy. Surrender in these circumstances would not involve a transfer of ownership.

[15] Counsel for the petitioner contended that the order as worded 'not to transfer or encumber in anyway whatsoever' is wide to cover the surrender of the sub sublease.

[16] I am of the view that the words of the said order must be read to facilitate maintaining the status quo pending hearing of the petition where the respondent shall not transfer or encumber the assets of the fourth and fifth respondent. There is clearly no transfer of the asset out of the fourth defendant to the fifth respondent. The act of surrendering the sub sublease vest the lease back to the fifth respondent. The consent order was to prevent the assets of the fourth and fifth respondent be transferred or encumbered to any other entity. I am satisfied that the act of surrendering the sub sublease does not amount to 'transferring or encumbering' the assets.

A **[17]** The respondents had also averred that the transfer was made on the honest belief that if the sub sublease is not surrendered to the State Authority, the mining permit will not be issued by the State Land and Mines Department. The petitioner however submitted that respondents had not shown proof of the requirement.

B **[18]** The ultimate question for the court in this contempt proceeding is whether the acts of the respondent had caused the assets to be dissipated to any other third party to defeat or impede any order the petitioner may obtain in respect of those assets in this petition. The petitioner would not be affected by the surrendering of this sub sublease and is not prejudiced in any way as she averred in her petition that she was the ultimate shareholder of the fifth respondent. The act of surrender to the **C** fifth respondent does not divest the asset to frustrate the underlying purpose of the undertaking.

[19] Based on the foregoings, I refused the application for an order of committal with no order as to costs.

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Application for an order of committal refused with no order as to costs.

Reported by Janani S

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